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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

Office of Legislative Counsel

10 JUL 1978

OLC RECORD COPY

Mr. Michael J. O'Neil, Chief Counsel
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mike:

As we discussed this morning, here are copies of papers concerning H.R. 11280, the Civil Service Reform legislation:

1. The amendment we proposed for Title I of the bill that would exempt CIA and NSA from Title I except insofar as the agencies could adhere to the merit principles consistent with their present statutory authorities and responsibilities.

2. A paper providing background information and examples on the above proposed amendment.

3. A copy of the amendment as introduced by Representative Derwinski on 29 June and which was adopted that same day; we hope to have the provision broadened to include the entire Chapter I.

4. Copies of papers explaining our various concerns with the legislation which we provided to the Minority Counsel of the Post Office and Civil Service Committee on 7 July.

I will keep you informed of how things proceed on this.

Sincerely,

SIGNED

25X1 [redacted]

Assistant Legislative Counsel

Enclosures

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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

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Office of Legislative Counsel

10 July 1978

Mr. Theodore J. Kazy
Minority Staff Director
Committee on Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Ted:

In follow-up to our discussion last Friday on provisions in H.R. 11280, the Civil Service Reform legislation, I would like to provide you with some additional information on two provisions: proposed subsection 5402(a) (page 173 of the June 15, 1978, Committee Print) and proposed Title VII ("Labor-Management Relations").

1. Proposed subsection 5402(a)--"Merit Pay System." As we discussed on 7 July 1978, in our view, the language "as established under chapters 51 and 53 of this title" should be inserted at the end of proposed subsection 5402(a), in order to make clear that the Merit Pay System is applicable only to positions under the Pay Classification Act. Since both CIA and NSA are not under the Pay Classification Act, this amendment would solve our concern that, in being subject to the Merit Pay System, our personnel system would, at least in part, become subject to external monitoring and regulation (by the proposed Office of Personnel Management). This, of course, would change the status quo as regards our present position, based on our statutory authorities, and would therefore be inconsistent with our need for exemptions from H.R. 11280. This amendment could be accompanied by Report language making clear that:

> "... As regards those agencies not subject to the Pay Classification Act, in which pay is fixed by administrative action, while not within the merit pay system proposed by chapter 54, it is anticipated that these agencies will follow the principles and procedures of the merit pay system to the maximum extent consistent with their authorities and responsibilities."

A different, and in our view less desirable, approach to resolve this problem would be to specifically exempt CIA and NSA from the scope of the Merit Pay System. This could be done by inserting the following language at the end of subsection 5402(a), on line 23 of page 173 of the June 15, 1978, Committee Print:

> "; Provided that the merit pay system shall not apply to the Central Intelligence Agency or the National Security Agency."

This amendment could be accompanied by Report language along the following lines:

> "The Central Intelligence Agency and the National Security Agency shall not be within the proposed merit pay system, based on the unique missions and needs of those agencies pursuant to their operative statutes. It is anticipated, however, that these agencies will adhere to the principles and procedures of the merit pay system to the maximum extent consistent with their authorities and responsibilities set forth in the National Security Act of 1947, as amended (50 U.S.C. 403), the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403a et seq.), Pub. L. 86-36, 73 Stat. 63, as amended, and Pub. L. 88-290, 78 Stat. 168, as amended."

2. Proposed Title VII--"Labor-Management Relations. It is essential that intelligence agencies not be subject to this proposed title. We strongly endorse the provision included in the Administration's proposed Title VII, which would exempt FBI, CIA, NSA, and other intelligence agencies (proposed subsection 7162(c)), as we discussed on 7 July 1978.

The much narrower intelligence agency exemption provided in paragraph 7112(b)(6), on page 23 of the June 22, 1978, Committee Print of proposed Title VII, is inadequate. This paragraph would exempt from "appropriate" labor "units" employees "engaged in intelligence, investigative, or security functions of any agency which directly affect national security." This formulation, in the first instance, does not specifically exempt agencies from coverage, but only certain employees within agencies. Moreover, only employees engaged in "intelligence ... functions ... which directly affect national security" (emphasis added) are exempted. This language would seem to require that a determination be made as to each employee, in CIA for example, to determine whether his duties "directly affect national security." While the overall mission of CIA and NSA clearly would fit this criteria, disputes might arise as to whether each individual employee's functions "directly affect national security." Because of this potential contradiction between each organization's overall functions and an individual employee's functions, applications of the standard would be difficult and could have the contentious and inequitable result of limiting the activities of some employees but not others. Moreover, if even some employees were

permitted to form an "appropriate labor unit," the results could severely impact on the ability of intelligence agencies to fulfill their vital missions. Finally, the proposed exemption in paragraph 7112(b)(6) of the Committee Print, unlike the exemption in subsection 7162(c) of the Administration's proposed Title VII, would not extend to the entire Subchapter III on "Federal Service Labor-Management Relations" [or, as the Committee Print is organized, to the entire Title VII, "Federal Service Labor-Management Relations].

We look forward to discussing these and other matters relating to H.R. 11280 with you. Thank you very much for your help.

Sincerely,

STAT

Robert L. Barr, Jr.
Assistant Legislative Counsel

1. National security amendment to section 2301 of the June 15, 1978, Committee Print of H.R. 11280, adopted 29 June 1978.

a. The language of this amendment should apply to all of Chapter I of H.R. 11280, in order to extend the necessary exemptions for CIA and NSA to section 2303 ("Responsibility of the General Accounting Office"). As with the exemption as applied to section 2301 ("merit system principles"), an exempt status for these agencies is based on the provisions in their present statutory authorities as cited in the amendment as adopted. (There presently is specific exemptory language for intelligence agencies in section 2302.) The recommended change, therefore, would make the applicability of H.R. 11280 to CIA and NSA consistent with the existing statutory situation.

b. The statutory cites in the amendment as adopted--"50 U.S.C. 402 Note, and 50 U.S.C. 833"--are improper in terms of the necessary scope of the exemption for NSA. "50 U.S.C. 402 Note" should be cited as "Pub. L. 86-36, 73 Stat. 63, as amended, and "50 U.S.C. 833" should be cited as "Pub. L. 88-290, 78 Stat 168, as amended." As an example of the need for these changes, 50 U.S.C. 833 contains only the special termination authority for the Director of NSA, whereas the Public Law cite--Pub. L. 88-290--also exempts NSA from the Performance Rating Act of 1950 and mandates special security requirements for employment in NSA. These recommended citation changes, therefore, would make the amendment to H.R. 11280 consistent with present laws as regards NSA.

2. Amend proposed subparagraph 1206(c)(1)(B) to make it consistent with subparagraph 1206(c)(1)(A).

Subparagraph (A) reads, in pertinent part: "(A) any disclosure, not prohibited by law or Executive order..." Subparagraph (B), which also relates to alleged reprisals against employees who disclose information (and the authority of the Special Counsel to receive such allegations), does not contain the limiting proviso," not prohibited by law or Executive order." The "disclosures" in subparagraph (A) concern violations of law, rules, or regulations; those in subparagraph (B) concern evidence of mismanagement, waste of funds, or abuse of authority. Since in fact this second category could, in the case of an intelligence agency such as CIA or NSA, concern information that is classified or otherwise protected against disclosure by law, just as could the category in subparagraph A, the "disclosure language" in both subparagraphs should be identical. In other words, if disclosures relating to alleged violations of laws, rules, or regulations are not to be "protected disclosures" within the meaning of section 1206, then disclosures relating to alleged mismanagement [e.g., of a sensitive intelligence project], waste of [e.g., intelligence] funds, or abuse of authority, should likewise not constitute such "protected disclosures." It is therefore recommended that the language ", not prohibited by law or Executive order," be added to subparagraph (B) after the word "... disclosure ..." as it appears on line 8 of page 28 of the June 15, 1978, Committee Print of H.R. 11280.

3. Report language to clarify the authority of GAO pursuant to paragraph 1206(c)(3).

Assuming the amendment to subparagraph 1206(c)(1)(B) noted above, the Report language for paragraph 1206(c)(3) should specify that, in conducting an examination reported to it under 1206(c)(2)(B), the GAO shall have no authority, derivative or otherwise, to examine any information "the disclosure of which is prohibited by law or Executive order." This language would ensure that the status of such information as not being "protected disclosures" within the meaning of section 1206 shall remain intact, notwithstanding any potential "finding" reported to GAO involving other information and regarding which access to information the disclosure of which is prohibited by law or Executive order may be sought.

4. Amend proposed subsection 1206(e), or include Report language, or both, to make clear that the requirement, in subsection 1206(e) of H.R. 11280, that the Special Counsel shall make public a "list of noncriminal matters referred to agency heads ..." is not intended to provide the Special Counsel any authority to disclose information that is classified or is protected against disclosure by law.

The language in the last sentence of subsection 1206(e)--lines 19 through 21 of the June 15, 1978, Committee Print of H.R. 11280--does not make clear on its face that the public list of "noncriminal matters" referred to agencies by the Special Counsel shall not contain information that is protected against disclosure by law or Executive order. Since it may not always be clear on the face of the information concerning alleged violations or improprieties which the Special Counsel may receive that classified or otherwise protected information is contained therein, it should be clarified--by amendment or by Report language, or both--that the provision is not intended to authorize the Special Counsel to disclose information that is classified or is protected against disclosure by statute. The matters that would be contained in such a public list by the Special Counsel would constitute only information he had received under his jurisdiction elsewhere in this section. To ensure that no information that is classified or protected against disclosure by statute is contained in a public list, it should be made clear that the Special Counsel, prior to including any information in a public list, shall consult with the head of the agency involved to determine if any classified or protected information is involved, in which case the information shall not be included in a public list.

5. Report language to clarify the investigations by the Special Counsel under subsection 1206(e) relate only to "investigations under the provisions of section 1206.

Inclusion of language in the Report on H.R. 11280 that the authority of the Special Counsel to investigate matters under subsection 1206(e) goes only to investigations which the Special Counsel is authorized by other provisions of this section to undertake, simply makes clear that subsection 1206(e) is not intended to confer any additional, independent investigative authority on the Special Counsel.

6. Amend subsection 1206(f) to exempt from its coverage CIA and NSA.

Subsection 1206(e) authorizes the Special Counsel to investigate certain specified categories of allegations other than those for which he is authorized elsewhere in section 1206. Consistent with the exemptions provided CIA and NSA--by virtue of these agencies' present statutory status--in Chapter I of H.R. 11280, the Special Counsel should not, through subsection 1206(e), obtain independent authority to investigate these agencies. It is therefore recommended that, in order for the scope of subsection 1206(e) to be consistent with the status of CIA and NSA in Chapter I, the following language be added as a new final sentence to subsection 1206(e) on line 2 of page 32 of the June 15, 1978, Committee print:

> "Nothing in this subsection shall be construed to impair the authorities and responsibilities set forth in the National Security Act of 1947, as amended (50 U.S.C. 403), the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403a et seq.), Pub. L. 86-36, 73 Stat. 63, as amended, and Pub. L. 88-290, 78 Stat. 168, as amended."

7. Clarification of the scope of subparagraph 1206(f)(1)(C).

The language of subparagraph 1206(f)(1)(C) could be construed to grant the Special Counsel broad authority to investigate any allegation that any information withheld under any provision of the Freedom of Information Act (5 U.S.C. 552) was done "arbitrarily or capriciously." This would constitute very broad authority and would effect a substantial change to the review procedures already established under the FOIA. If the reference to "5 U.S.C. 552" in subparagraph 1206(f)(1)(C) is narrowed to "5 U.S.C. 552(a)(4)(F)," which relates to court findings that information may have been withheld "arbitrarily or capriciously," then the impact would, of course, be much more limited. In that case, all that would be necessary would be Report language merely clarifying that the Special Counsel is not intended to have authority independent of a court finding under 5 U.S.C. 552(a)(4)(F) to investigate certain withholdings of information. A broader construction of the provision in subparagraph 1206(f)(1)(C), however, which could be construed to give the Special Counsel independent, plenary authority to investigate any withholdings under 5 U.S.C. 552, would pose serious problems for CIA and NSA.

8. Amendment to subsection 5402(a) to ensure that the Merit Pay System is applicable only to positions under the Pay Classification Act.

It is recommended that the following language be added to the end of subsection 5402, beginning at line 23 of page 173 of the June 15, 1978, Committee Print of H.R. 11280: "as established under chapters 51 and 53 of this title." This additional language makes clear that only those positions at the GS-13 through GS-15 level established under the Pay Classification Act shall be within the "Merit Pay System" established under section 5402 of H.R. 11280. (The proposed additional language is identical with language adopted by the Senate Governmental Affairs Committee in its consideration of S. 2640.)

9. Amend proposed Title VII of H.R. 11280 to exempt from coverage intelligence agencies.

The Administration's proposed Title VII, "Labor-Management Relations," provided, as a proposed subsection 7162(c), that proposed Subchapter III would not apply to FBI, CIA, NSA and other intelligence agencies. This exemption is essential if intelligence agencies are to be able to fulfill their vital and unique missions without threats of disruptions that could endanger important national security activities. In the case of CIA and NSA, such an exemption is based on these agencies' organic laws,* and as regards all intelligence agencies, on the provisions of Executive Order 11491. It is therefore recommended that the exemptive provisions as included in subsection 7162(c) of the Administration's proposed Title VII to H.R. 11280, be included in section 7162 of H.R. 11280.

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*50 U.S.C. 403, 50 U.S.C. 403a et. seq., Pub. L. 86-36, 73 Stat. 63, as amended, and Pub. L. 88-290, 78 Stat. 168, as amended.